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# Online Music Communities & The Future of Copyright Royalties

Jennifer Vasquez

## I. Introduction

It is a well-established principle of American law that an author of a work should reap the fruits of his or her intellectual creativity for a limited period of time. It was under this basic principle that the concept of copyright was created. Copyright is a form of protection provided by the laws of the United States for “original works of authorship, including literary, dramatic, musical, architectural, cartographic, choreographic, pantomimic, pictorial, graphic, sculptural, and audiovisual creations.”<sup>1</sup> Upon the fixation of a work into a tangible medium expression, the work became a piece of property whose owner was afforded a bundle of specific rights. The author/owner had the exclusive right to reproduce, distribute, and, in the case of certain works, publicly perform or display the work. In other types to work the owner has the right to prepare derivative works. In the case of sound recordings, to perform the work publicly by means of a digital audio transmission; or to license others to engage in the same acts under specific terms and conditions.<sup>2</sup>

In our digital world the concept of property and in particular intellectual property such as copyrights and trademarks has gotten murkier. Sound recordings, or music, the copyright scheme has gotten even more convoluted. In this paper, I first set the traditional law under Copyright. Events, some of political importance, others of a more social nature, shaped the copyright laws in the United States as they pertain to music. Now as

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<sup>1</sup> <http://www.copyright.gov/circs/circ1a.html>

<sup>2</sup> Id.

we venture into the digital age even further, in light of such new technological developments as music online communities, the scheme of copyright royalties and even ownership have come into question. The traditional legal model no longer stands as strong as it did when it was first enacted. I will analyze how the digital world is impacting the traditional copyright legal landscape and what we can expect in the future. Lastly, I will explore the recent trends and what that ultimately means for the multiple interest groups.

## II. WHAT IS A COPYRIGHT?

### a. History

Copyrights are statutory, codified in Title 17 of the United States Code. The U.S. Constitution gave the Congress the power to create copyright protection in Art. I, § 8, cl. 8, which states Congress, has the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventor the exclusive Right to their respective Writings and Discoveries.”

The First Congress of the U.S. enacted the first copyright provision in 1790.<sup>3</sup> The Copyright Act of 1790 granted only American authors the right “to print, re-print, or publish their work for a period of fourteen years and to renew for another fourteen. The law was meant to provide an incentive to authors, artists, and scientists to create original works by providing creators with a monopoly.”<sup>4</sup> However, this monopoly was limited in order to stimulate creativity and the advancement of “science and the useful arts” through

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<sup>3</sup> *Copyright Timeline: A History of Copyright in the United States*, **ARL.Com**: <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline>.

<sup>4</sup> *Id.*

wide public access to works in the "public domain."<sup>5</sup> While noble the scheme did not make the authors completely happy.<sup>6</sup> For this and several other reasons this copyright had major revisions implemented in 1831, 1870, 1909, and 1976.

Initially music was not protected. It was kept out of the first four revisions of the United States' statute. The revision of 1831 expanded the law to include musical compositions within the federal scheme.<sup>7</sup> However, only the reproduction rights for printed music were protected.<sup>8</sup> The sound recordings themselves had not protection as of yet because the technology had not yet been invented. Thus, the scores of music or the written embodiment of the music itself was copyrightable.<sup>9</sup>

Additionally, Congress first established and recognized a public performance right for musical compositions in 1897.<sup>10</sup> The 1897 statute granted protection to music copyright holders by providing that "[a]ny person publicly performing or representing any ... musical composition for which a copyright has been obtained, without the consent of the proprietor of said ... musical composition ... shall be liable for damages ...."<sup>11</sup> This, as we will see later on in history, was never truly extended until the digital age.

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<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Vanessa Van Cleaf, A Broken Record: The Digital Millennium Copyright Act's Statutory Royalty Rate-Setting Process Does Not Work for Internet Radio, 40 Stetson L. Rev. 341, 392 (2010).

<sup>11</sup> Id. ; see also Sunny Noh, Better Late Than Never: The Legal Theoretical Reasons Supporting the Performance Rights Act of 2009, 6 Buff. Intell. Prop. L.J. 83, 89 (2009)

The first major copyright statute came in June 1, 1909.<sup>12</sup> This revision broadened the scope of copyrights to include all works of authorship, including for the first time dramatic works.<sup>13</sup> This was due to the growth of the Hollywood film industry. It also extended the renewal term of a copyright protection from 14 to 28 years.<sup>14</sup> This meant that copyright holders were able to no hold their rights and prevent their work from entering the public domain for a total of 28 years, 14 years initial period with a 14 year available extension upon application. Specifically for copyright protection in music, this act was the first act to afford music copyright owners the “exclusive right to make or sell any mechanical device that reproduced [a given] work in sound.”<sup>15</sup>

This created the first compulsory mechanical license. A compulsory license allows anyone to make a mechanical reproduction (referred to now as a phonorecord) of a musical composition without the consent of the copyright owner given that person adheres to the provisions of the licensing system.<sup>16</sup> The system states that the copyright owner must have already released the music and the licensee must provide the owner with a letter of intent to use before a compulsory license can be obtained. This compulsory license is now common practice and makes it possible to record and distribute a cover version of a song, once its been released and a notice of intent to use is supplied to the copyright holder.<sup>17</sup>

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<sup>12</sup> United States Copyright Office: A Brief Introduction and History, Copyright.org:  
<http://www.copyright.gov/circs/circ1a.html>

<sup>13</sup> Vanessa Van Cleaf, A Broken Record, 40 Stetson L. Rev. 341, 392 (2010).

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Copyright Act of 1909, Wikipedia.com:  
[http://en.wikipedia.org/wiki/Copyright\\_Act\\_of\\_1909](http://en.wikipedia.org/wiki/Copyright_Act_of_1909)

<sup>17</sup> Id.

Congress, enacting the 1909 Act addressed the difficulty of balancing the public interest with proprietor's rights when extending the protection to music:

“[E]xpanding copyright protection accorded to music has been to give the composer an adequate return for the value of his composition, and it has been a serious and difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests”<sup>18</sup>

This hard and difficult task did not end with this revision of the Copyright Act. There was still much work to devise a legal scheme that would balance the needs of all the players: the owners of the copyrights and the general public.

Congress addressed some of these issues in the Copyright Act of 1976, which supersedes all that came before it. Effective February 15, 1978, the act extended limited copyright protection to sound recordings fixed and first published on or after this date.<sup>19</sup> The term of protection was increased to the life of the author plus a renewal term of 50 years after the author's death.<sup>20</sup> The Act of 1976 also granted a public performance right for music but only with respect to the underlying compositions themselves, not the public

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<sup>18</sup> H.R. Rep. No. 2222, 60th Cong., 2nd Sess., p. 7 [1909]

<sup>19</sup> United States Copyright Office: A Brief Introduction and History, Copyright.org: <http://www.copyright.gov/circs/circ1a.html>

<sup>20</sup> Id. This term, was however, changed in 1992 when the renewal term requirement was removed and thus works copyrighted between January 1, 1964, and December 31, 1977, were automatically renewed even if registration was not made; yet again it was changed in 1998 when the term became life of the author plus 70 years, totaling a 95/120 year potential protection.

performance of sound recordings.<sup>21</sup> Thus, when a work is played on the radio, the radio station is only required to pay royalties to the composer based on the composition, and not to the artist or the holder of the copyright for the sound recording.

Under 1976 Act, copyright protection requires two elements for a work to be copyrightable. First, it must be an original work of authorship.<sup>22</sup> Second, the work must be fixed in any tangible medium of expression now known or later developed, from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.<sup>23</sup>

The first element, originality, requires a discernable modicum of originality in order to receive copyright protection. The standard for determining whether sufficient originality exists is whether a work contains “some substantial, not merely trivial, originality.”<sup>24</sup> Copyright protection, however, will only extend to those portions of a work that are original.<sup>25</sup>

The second factor requirement for a work to be copyrightable is its expression in a fixed tangible medium.<sup>26</sup> Under 17 U.S.C.A. § 101, a work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived,

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<sup>21</sup> Vanessa Van Cleef, A Broken Record: The Digital Millennium Copyright Act's Statutory Royalty Rate-Setting Process Does Not Work for Internet Radio, 40 Stetson L. Rev. 341, 353 (2010)

<sup>22</sup> 17 U.S.C.A. § 102

<sup>23</sup> Id

<sup>24</sup> L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490, 189 U.S.P.Q. 753 (2d Cir. 1976).

<sup>25</sup> Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358, 18 Media L. Rep. (BNA) 1889, 18 U.S.P.Q.2d 1275, 121 Pub. Util. Rep. 4th (PUR) 1 (1991).

<sup>26</sup> 17 U.S.C.A. § 101.

reproduced, or otherwise communicated for a period of more than transitory duration.” This means that while a band’s live performance is not copyrightable the recording of that performance would be due to the “fixed” nature of the tape on which it was recorded.<sup>27</sup>

Once a person is able to prove that their work is an original work of authorship that is fixed in a tangible medium, he/she is afforded certain rights under the law. Those rights, which are defined by 17 U.S.C.A. § 106 and include the right to: i) prepare copies of the work; ii) distribute the work; iii) prepare derivatives of the work; iv) perform the work; and v) display the work. Included in this bundle of rights is the right to license others to do anything that the copyright owner can do or the right to keep others from infringing upon any of these rights.<sup>28</sup> Sound recordings, however, have certain limitations on these rights.<sup>29</sup>

#### b. Copyrights in Musical Recording

When copyrighting a musical work under 17 U.S.C.A. § 101 of the United States it creates two distinct aspects protections: (1) the musical composition, which comprises of two different aspects: (a) music and (b) lyrics; and (2) the master recording, which in simple terms is the physical embodiment of a particular performance of the musical compositions.<sup>30</sup>

Music as explained above was first given limited protection before the codification of 1909. In the 1909 Act music copyright protection was first federally

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<sup>27</sup> 58 Causes of Action 2d 663 (Originally published in 2013).

<sup>28</sup> *Supra*.

<sup>29</sup> 58 Causes of Action 2d 663 (Originally published in 2013)

<sup>30</sup> *Ulloa v. Universal Music and Video Distribution Corp.*, 303 F. Supp. 2d 409, 70 U.S.P.Q.2d 1835 (S.D. N.Y. 2004).



codified. This Act gave composers their first exclusive right to the mechanical reproduction of their music- i.e. the reproduction of the master recording. It was not until the 1976 Act that sound recordings were afforded federal copyright protection. To be more exact, sound recordings and their underlying musical compositions are “separate works with their own distinct copyrights; rights of copyright in sound recording do not extend to song itself and vice versa.”<sup>31</sup> Thus, owning the copyright in a sound recording does not encompass the copyright in the musical composition, underlying lyrical composition or even the actual recording itself, the master recording.<sup>32</sup> This duality in protection creates a massive loophole that will later be discussed.

The 1976 Act amended the 1909 Act to clarify that phonorecords were indeed “copies” within the meaning of the statute, and should be afforded copyright protection.<sup>33</sup> Today, no federal protection is afforded to sound recordings made before 1972. After the 1976 Act, sound recordings were given limited copyright protection but were not afforded a public performance right. This anomaly is the crux of many seeking copyright reform.

The absence of a public performance right in sound recordings means that the copyright holders, which are usually the record companies or the artist themselves, are not compensated separately when the sound recording themselves are performed

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<sup>31</sup> *Griffin v. J-Records*, 398 F. Supp. 2d 1137 (E.D. Wash. 2005); See also *T.B. Harms Co. v. Jem Records, Inc.*, 655 F. Supp. 1575, 8 Int'l Trade Rep. (BNA) 2541, 2 U.S.P.Q.2d 2025 (D.N.J. 1987).

<sup>32</sup> *Jarvis v. A & M Records*, 827 F. Supp. 282, 27 U.S.P.Q.2d 1812 (D.N.J. 1993).

<sup>33</sup> Vanessa Van Cleaf, A Broken Record: The Digital Millennium Copyright Act's Statutory Royalty Rate-Setting Process Does Not Work for Internet Radio, 40 Stetson L. Rev. 341, 352 (2010)

publically.<sup>34</sup> To put simply, when an artist is broadcasted via terrestrial radio, i.e. AM or FM radio, the radio station pays a royalty rate to the composer of the work for the public performance of only the musical composition but does not pay royalty for the public performance the sound recording.<sup>35</sup>

Royalties are set on a “statutory rate” set by the United States Congress. As there are different copyright protections in music, there are also different royalty payment schemes set up. As a result of the 1909 Act, which as stated above was the first federal statute that afforded copyright protection to music, different organizations were created to protect the rights of each of the major players involved in the music industry: the record companies, the composers and artist, and lastly, the broadcasters of music.

The first of these organizations was the American Society of Composers, Authors and Publishers (“ASCAP”) was formed in 1914.<sup>36</sup> ASCAP is a collective rights organization, which was created to protect composers’ rights in both musical works and public performances.<sup>37</sup> BMI, the second collective rights society was created in 1939 and represented several major radio networks and independent radio stations, and formed to advance the broadcaster’ interests.<sup>38</sup> Lastly the Recording Industry Association of America (RIAA) formed in 1952 to represent recording companies' interests in copyright law negotiations.<sup>39</sup> The 1976 Act also created the controversial Copyright Royalty Tribunal (“CRT”). The CRT was an independent administrative agency charged with setting compulsory license rates for the five rights enumerated in the prior paragraph. The

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<sup>34</sup> Id

<sup>35</sup> Id.

<sup>36</sup> Vanessa Van Cleef, 40 Stetson L. Rev. 341, 350 (2010).

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

CRT would have to power to adjudicate disputes arising out of these licenses.<sup>40</sup> The CRT, however, ceased to exist in the late 1990s.

The 1976 Act was a noble attempt at codifying copyright law. But as we now know, the digital age has proven that body of law unsustainable. For these reasons, Congress enacted the Digital Millennium Copyright Act (“DMCA”) and the Digital Performance Rights Act (“DPRA”).

c. Digital Copyright Law: the DMCA and the DPRA

The DPRA was enacted in 1995.<sup>41</sup> This act granted a performance right in sound recording but only as it related to digital audio transmission.<sup>42</sup> The outcome was a compromise between the recording industry and terrestrial radio. However, what resulted muddled copyright law to the fullest extent.

Terrestrial radios’ retained their exemption from paying the extra public performance royalty in sound recording and essentially “grandfathered” them into the old copyright scheme.<sup>43</sup> The Senate Committee responsible for this Act cited the antiquated notion that traditional broadcast radio is responsible for the success of many artists through the benefit of free and considerable airplay.<sup>44</sup> Moreover, it also cited that terrestrial radio’s livelihood depended on such an outcome. This conclusion, however, was one that came directly from terrestrial radio lobbyist groups.

Interestingly, the DPRA new partial-performance right only affected webcasters and satellite broadcasters- and all other new media. The Act also divided subscription

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<sup>40</sup> Vanessa Van Cleef, 40 Stetson L. Rev. 341, 353 (2010).

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Sen. Jud. Comm., Digital Performance Right in Sound Recordings Act of 1995, 104th Cong. 16 (Aug. 4, 1995).

webcasting services into two major categories: interactive and non-interactive. Interactive services are services that give the user the option to choose the next song that will be played, while non-interactive services do not give users these options and if they do those options are minimal.<sup>45</sup> Non-interactive subscription services did not have to pay the public performance royalties, yet the interactive subscription services were “required to negotiate webcasting licenses directly with copyright holders.”<sup>46</sup> Simply put, DPRA initially only required that subscription webcasting services and interactive webcasting services would be the only media to pay this additional licensing fee.<sup>47</sup> However, in 1998, due to growing concern from traditional broadcast radio and record labels, Congress amended the Act to require non-subscription webcasting service to pay performance royalties as well.<sup>48</sup>

Further along in the 1990’s came the DMCA. The DMCA of 1998 came about at a time when copyright infringement by digital format was rampant through services like Napster. Napster and other peer-to-peer file sharing services were responsible for major losses to the music industry numbering in the millions of dollars per day.<sup>49</sup> As the 1998 amendment to the DPRA was geared towards non-subscription webcasting services, so too was the DMCA. As interest groups for the recording industry successfully lobbied Congress, the Senate Committee responsible for this Act found that the very nature of webcasting, both subscription and non-subscription services alike, threatened the

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<sup>45</sup> Supra Van Cleef, 40 Stetson L. Rev. 341, 345 (2010).

<sup>46</sup> Id.

<sup>47</sup> *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d at 155 (stating that “webcasting services, which provide free--i.e., nonsubscription--services that do not provide particular sound recording[s] on request ... at that time fell outside the sound recording copyright holder's right of control”)

<sup>48</sup> Id.

<sup>49</sup> *A&M Recs., Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 901-902 (N.D. Cal. 2000).

business model of the recording companies to the brink of extinction. This led some, but not all, non-subscription services to be required to pay royalties.<sup>50</sup>

As in the past, the DMCA exempted terrestrial radio from paying royalties for traditional “over the air” broadcast. However, in recent Supreme Court decisions, terrestrial radios were to pay digital broadcasting fees when they simultaneously webcasted or “simulcasted” through a digital medium.<sup>51</sup> DMCA preserved the distinction between interactive and non-interactive services “whereby the former negotiates rates directly with copyright holders and the latter pays statutorily mandated royalty rates, which are determined by engaging in voluntary negotiations with the copyright holders’ statutorily designated representative.”<sup>52</sup>

When determining royalties, the digital webcaster has two distinct options. It can negotiate with the statutory rates with the designated statutory licensing representative (the only option for non-subscription services) or it can negotiate directly with each individual label in order to retain proper direct license fee. The copyright holders have a licensing representative, a nonprofit performance rights organization, currently it is SoundExchange, negotiates with digital media broadcasters to come to an agreement. SoundExchange sets the statutory rates according to a “willing buyer-willing seller” standard -basically, “what . . . would have been negotiated in the marketplace between a willing buyer and a willing seller.”<sup>53</sup> SoundExchange is also considers whether webcasting has had a positive or negative effect on music sales when determining the

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<sup>50</sup> Vanessa Van Cleaf, 40 Stetson L. Rev. 341, 360 (2010)

<sup>51</sup> Id Citing *Bonneville International Corp. v. Peters*, 347 F.3d 485 (3d Cir. 2003).

<sup>52</sup> Vanessa Van Cleaf, 40 Stetson L. Rev. 341, 360-61 (2010).

<sup>53</sup> Id.

appropriate statutory royalty rate.<sup>54</sup> However, if the parties are not pleased with SoundExchange's proposed statutory rates, then the rates are reviewed administratively by the Copyright Royalty Board, and can be appealed to the Librarian of Congress, then the Court of Appeals for the District of Columbia Circuit- or in other cases any Federal Court.<sup>55</sup>

However, where does this leave us? As we have developed new interactive, subscription, non-interactive subscription, interactive non-subscription and a whole slue of other type of digital broadcasting mechanisms, there is an ongoing fight in the media, in the court room, in Congress and even in our inboxes about what is right and wrong with our current royalty payment scheme. In the next part of this paper, I will discuss the different online music communities, predominately the most important, and how they have impacted the change in American Copyright law.

c. Digital Music Copyright The Recent Past

There have been many developments, where almost every day there seems to be a new idea to counteract or try to resolve the problems of our copyright system.

As the system currently stands, an interactive webcaster can go directly to the rights holder and seek to reach a mutual agreement on what the royalty rate would be.<sup>56</sup> Non-interactive webcasters can voluntarily, but are not required to, seek to negotiate with the appropriate performing rights organizations (“PROs”), SoundExchange and all others at the negotiating table.<sup>57</sup> If any of the parties do not agree with the decision promulgated

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<sup>54</sup> Id.

<sup>55</sup> Id.

<sup>56</sup> Vanessa Van Cleaf, A Broken Record, 40 Stetson L. Rev. 341, 361 (2010).

<sup>57</sup> Id.

by SoundExchange, it can appeal to the Copyrights Royalty Board and can ultimately sue in district court.<sup>58</sup>

There have been several developments in Congress in past ten years, which have directly affected digital copyright law. In 2004, Congress passed the Copyright Royalty and Distribution Reform Act of 2004 (“Reform Act”), which outlined the process to which the statutory rate would be created.<sup>59</sup> The Reform Act delineated that the Library of Congress would appoint three full time judges to sit on the Copyright Royalty Board (“CRB”) who would make decisions on the royalty rate according to several factors predominately based on a free market, willing buy, willing seller theory.<sup>60</sup> Every decision by the CRB would be reviewed by the United States Court of Appeals for the District of Columbia Circuit and would only “will overturn a decision only if it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law.’”<sup>61</sup>

Using this process there have been two separate statutory rates, the 2002 Rates and the 2007 Rates. However, intermittently there have been smaller Acts enacted by Congress to appease different interest groups. First was the Small Webcaster Settlement Act (“SWSA”), which tried to appease the needs of smaller, less significant webcasters who lobbied Congress on the premise that they will cease to exist if they were forced to pay the original 2002 Rates.<sup>62</sup> This settlement allowed the smaller webcasters with fewer stakes in the market place the ability to reach “independent settlement negotiations with

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<sup>58</sup> Id.

<sup>59</sup> Id at 345.

<sup>60</sup> Id.

<sup>61</sup> Id.

<sup>62</sup> Id.

the United States Copyright Office.<sup>63</sup> The second minor settlement came in 2008 with the Webcasters Settlement Act (“WCSA”).<sup>64</sup> This was in response to the 2007 Rates, which webcasters believed were too high and the recording industry believed was too low. Under WCSA, webcasters were able to bring down the 2007 Rates with a rate deadline date of 2010. Thus in 2012, a new proposed set of Rates were introduced that would have a deadline in 2015. The two Rates and the two settlements seem to be nothing more than Band-Aid solutions that haven’t truly cemented any real change in the way royalties are created, or how they are paid.

There have been much dissatisfaction with the manner in which Congress, the CRB and interest groups have handled Copyright issues in the digital age.

### III. Online music communities And The Copyright Law

The current legal landscape for copyright protection as it pertains to music is in disarray and does not account for the complexity of the music industry in the digital era. The DMCA and DPRA were weak attempts at filling the massive loopholes in the royalty system as evidenced by the multiple appeasing Acts that followed. The online digital music communities are thus forced to pioneer new paths to alleviate the problems of: royalty disparity among the different categories of communities, music industry declining revenues, fair artist compensation as well as try to create business models that are lucrative. However, without new legislation and/or a Congressional overhaul of the system these attempts have fallen short and have just caused more confusion in the marketplace.

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<sup>63</sup> Id.

<sup>64</sup> Id at 371.



In the next section, we will examine the digital eras' unique problems and how different parties in the music industry are addressing these issues.

a. The Digital Music Market

Our history as human beings has always been centered on the idea of community. With the introduction of the Internet the concept of community broadened as the world essentially shrunk. Today about 2,405,518,376 people use the internet worldwide.<sup>65</sup> The number of Internet users has grown by 566% since 2000.<sup>66</sup> The United States of America leads the world with 78.6% of its citizens using the Internet on a daily basis.<sup>67</sup> More importantly, two-thirds or 62%, of Internet users ages 16-64 engage in some sort of legitimate music activity within the past six-months.<sup>68</sup> Conversely, 34% of Internet users still engage in illegal music activity as well.<sup>69</sup>

By those statistics it is clear that the demand for music drives the digital world. There is a growing digital economy specifically built around music. Music listeners have options such as download stores, subscription services and streaming services, all which give them access to millions of artist from around the world. The major players in these arenas are: Pandora, an online radio; Spotify, a subscription service; Itunes, a download store now with an accompanying online radio; Google Play, a subscription service; and, Youtube, a video streaming site. In addition, there are over 500 licensed digital music services operating world wide, allowing customers to access about 30 million sound

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<sup>65</sup> By Culture-ist. "More than 2 Billion people Use the Internet." May 9, 2013. Available at: <http://www.thecultureist.com/2013/05/09/how-many-people-use-the-internet-more-than-2-billion-infographic/>

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> IFPI Digital Music Report: Engine of a Digital World. Available at: <http://www.ifpi.org/content/library/dmr2013.pdf>

<sup>69</sup> Id.

tracks.<sup>70</sup> While there still exist massive amount of piracy there are more legal outlets for a music fan to enjoy and access their favorite artists.

In 2012, record companies' digital revenue was estimated at \$5.6 billions, up an estimated 9% from only a year before, and accounting for more than a third of total music industry revenues, or about 34%.<sup>71</sup> Seventy per cent of global digital revenues come from downloading stores, however, paying subscriber services are up 44% in the past year alone.<sup>72</sup> Subscription services only represent 10% of the total digital music market, however, they are on the rise and has even surpassed the market share of downloading stores in some countries.<sup>73</sup> For video streaming services such as YouTube, which boast 800 million active users worldwide, 9 out of 10 of the most popular videos are music videos.<sup>74</sup> This success can be widely attributed to the popularity of music channels such as VEVO and Warner Music Sound. Moreover, Internet radio has also seen a great success this past year. Pandora, the largest company offering this service already represents 8% of all radio listening in the U.S.<sup>75</sup>

The idea behind all these online music communities is accessibility. Each platform mentioned above all have, or are process of acquiring, corresponding desktop portal in the form of traditional website, a mobile application and synchronization with each of the users multiple digital devices. To remain a leader in this very competitive,

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<sup>70</sup> International Federation of the Phonographic Industry. "*IFPI Digital Music Report: Engine of a Digital World*." Available at: <http://www.ifpi.org/content/library/dmr2013.pdf>

<sup>71</sup> Id.

<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Id.

<sup>75</sup> Id.

ever changing digital music market these online music communities have to constantly innovate and ensure that their customers are satisfied with their experiences.

Downloading stores have had to deal with the problem of listener accessibility throughout all devices. Thus, as it pertains to downloading stores, many of the new innovations this past year have included the “expansion of cloud-based services with scan and match features so users can access their music at all times and from all their devices.”<sup>76</sup> This was a particularly important new feature for Amazon Cloud Player, Google Play and Microsoft’s Xbox Music, which now offers ‘Xbox Music Pass’ for \$9.99 a month.<sup>77</sup> For iTunes the innovation of cloud usage was transformed with the synchronization of all devices with the new iCloud, which is now used by all of Apple’s 190 million customers.<sup>78</sup> Other improvements came in the form of plans to expand internationally, the proliferation and improvement of mobile applications, better smart radio tools –like the new iTunes radio, and added social functionality such as more Facebook and other social media integrations.”<sup>79</sup> Download stores are sales of tracks and albums and as a result pay a royalty fee as such. However, with such technical innovations such as new features like iTunes Radio these outlets will inevitably run into the same problems as other streaming sites.

Subscription services that provide streaming services are still fairly new but have proven to be a major player in the online digital music market. It is one of the fastest growing sectors. These services have seen a 44% increase in their subscriber numbers.<sup>80</sup>

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<sup>76</sup> Id at page 14.

<sup>77</sup> Id at page 16.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> Id at 15.

More importantly, they have seen an increase in revenue of about 59% in the first half of 2012 alone.<sup>81</sup> These particular music communities, whose leader is Spotify, are driven by “successful bundling deals with internet service providers (“ISPs”) and mobile operators, an improved user experience, integration with social networks and a greater variety of price points.”<sup>82</sup> The methods seem to have prove to work by 20% of Spotify users convert to the services premium service, which allows for unlimited access to the sites 20 million songs.<sup>83</sup>

However, despite their growth, subscription services have had trouble establishing a profitable alternative to the expensive ‘pay-per-play’ business model. It is expected that Spotify will pay out about \$1billion dollars in royalties by the end 2013.<sup>84</sup> Mark Williamson, director of Artists Services for Spotify has stated the company pays more that 70% of its revenues to paying royalties.<sup>85</sup>

The most interesting idea behind the model however, is that the music is no longer the product but rather the stream itself is property which is the premise of any claims. This model is something unlike what the music industry was ever used prior because it changed the fundamental concept of owning music. Now music is no longer a product to be sold, but rather a service with interactive features and accessibility that only mimics ownership. However, unlike the sale of music or its airplay on terrestrial radio,

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<sup>81</sup> Id.

<sup>82</sup> Id

<sup>83</sup> Id; See also Rochell. “*There are 4 Millions Songs on Spotify that Hav Never Been Played Once...*” October 11, 2013. Available at: <http://www.digitalmusicnews.com/permalink/2013/10/11/songsonspotify>

<sup>84</sup> NPR Staff. “Paying the Piper: Music Streaming Perspective.” Jul 28 2013. Available at: <http://www.npr.org/blogs/therecord/2013/07/28/205873218/paying-the-piper-criticism-of-music-streaming-services-in-perspective>

<sup>85</sup> Id.

subscription services pay royalties every time a song is played. This of course is due to the digital performance right in music the DPRA and DMCA created. Many have attempted to negotiate with record labels to offer different licensing prices in order to in turn offer users different price points of based on daily, weekly and some monthly access but these are fairly new concepts that have not proven successful.<sup>86</sup>

Another type of music online community and probably one of the biggest involves video stream through YouTube. YouTube boast its 800 million users worldwide and a host of online music channels. It is dubbed this generation's MTV.<sup>87</sup> However, there is still illegal uploads that which need to be monitored on a constant basis in order to escape copyright liability. This creates a very unique problem for the site. YouTube generates its revenues from advertising but could not run such advertisements nor make money of the illegal music on the site. To fight such problems YouTube has encouraged agencies, such as Fullscreen and Maker Studios, to connect these unsigned cover artist and connect them with the rights holders.<sup>88</sup> This year both agencies made groundbreaking deals with Universal Music Publishing Group.<sup>89</sup> This essentially allows unsigned artist and YouTube to profit from advertising and in turn they will pay the copyright holder publishing royalties. This while innovating does not alleviate the root of the piracy problem which the recording industry is so desperately trying to eradicate.

Internet radio from services like Pandora, Slacker and iHeartRadio on the other hand is also affected by the performance right in digital music and claims it pays more

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<sup>86</sup> Supra, "*IFPI Digital Music Report: Engine of a Digital World*" at page 18.

<sup>87</sup> Nelson Noah. "Covering Pop Hits on YouTube is Starting to Pay Off." Mar 13 2013. Available at: <http://www.npr.org/blogs/therecord/2013/05/13/182880665/covering-pop-hits-on-youtube-is-starting-to-pay>

<sup>88</sup> Id.

<sup>89</sup> Id.

than half of its revenue to rights holders.<sup>90</sup> Pandora boasts an amazing 66 million active users, have expanded over seas into Australia and New Zealand, and forged lucrative deals with 60 brands of cars to enable Pandora in their vehicles.<sup>91</sup>

While there have been much advancement for Pandora, it could not come to an agreement with ASCAP one of the PROs responsible for collecting royalties for the recording industry.<sup>92</sup> Pandora sued ASCAP in Federal Court in search for a court mandated royalty rate that would be more beneficial to Pandora. Pandora is currently required to pay a minimum of 20% of its revenue to royalties.<sup>93</sup> As we understand from the disparity in royalty rates, Pandora's main argument is that just as terrestrial radio benefited the artist and thus does not pay royalties for performance, as too should Pandora be treated. This, however, is a long shot, but it could possibly reduce its royalty payment.

The interest of these music online communities lies in the disparity within in the law for terrestrial radios, satellite radios and digital formats. Pandora for example urges Congressional Action in order to reduce their royalty payments primarily because in 2011 it paid about half its revenues in music royalties, while Sirius XM Radio "paid less than 10 percent."<sup>94</sup> As mentioned in the above non-interactive satellite stations were grandfathered into a lower royalty rate than interactive-webcasting. Pandora and other

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<sup>90</sup> Sisario, Ben. "Digital Notes: A Royalty Dispute Spills Online" Oct 4, 2012. Available at: <http://mediadecoder.blogs.nytimes.com/2012/10/04/digital-notes-a-royalty-dispute-spills-over-online/>

<sup>91</sup> Id

<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> Sisario, Ben. "Digital Notes: A Royalty Dispute Spills Online" Oct 4, 2012. Available at: <http://mediadecoder.blogs.nytimes.com/2012/10/04/digital-notes-a-royalty-dispute-spills-over-online/>

supports of the Internet Radio Fairness Act (“IRFA”) claim that the standard of “willing buyer, willing seller” used by the Copyright Royalty Board results in unfairly high royalty rates.<sup>95</sup> However, due to bad press and unequivocal backlash from artist organization, music industry executives and even the N.A.A.C.P., Pandora has officially abandoned its pursuit to lower its royalty rates through the IRFA.<sup>96</sup> Pandora will, however, continue to find different avenues for resolution.<sup>97</sup>

However, Pandora has not yet given up. In addition to the litigation, in July of this year, Pandora purchased a radio broadcast station in Grand City, South Dakota.<sup>98</sup> The sole purpose of such a backward seeming purchase is to obtain a lesser royalty rate due to the nature of simulcasting, meaning having a terrestrial and digital broadcast.<sup>99</sup> There are very few simulcasting companies, Clear Channel the owner of hundreds of radio stations across the United States and owner of iHeartRadio, is one of the very few. The DMCA simulcasting broadcaster only pay the same amount, as they would pay for their terrestrial broadcasting royalties.<sup>100</sup> This, however, has many artist and artist groups rightfully upset. If Pandora does achieve its goal a massive percentage of artist royalties would disappear.

However, while Pandora is trying to pull this “stunt” as many artists have referred to it as, Clear Channel is doing the complete opposite. As a terrestrial broadcasting

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<sup>95</sup> Id.

<sup>96</sup> Rasnikoff, Paul. “Pandora Abandons its Royalty Slashing IRFA Legislation.” Nov 26, 2013. Available at: <http://www.digitalmusicnews.com/permalink/2013/11/26/pandoraabandoning>

<sup>97</sup> Id.

<sup>98</sup> Sydell, Laura. “Pandora Buys A Radio Station, Songwriter’ Group Call It A Stunt.” Jun 15 2013. Available at: <http://www.npr.org/blogs/therecord/2013/06/15/191703769/songwriters-group-calls-pandoras-radio-station-buy-a-stunt>.

<sup>99</sup> Id.

<sup>100</sup> Id.

conglomerate who simulcasts in digital format as well, Clear Channel doesn't pay any performance royalties. However, it recently executed a deal with Big Machine Label a small country music label with artist in its repertoire such as Tim McGraw and Taylor Swift.<sup>101</sup> The deal would let Clear Channel get out of the pay-per-play model it is required to pay on its online digital radio iHeartRadio and in return it will pay Big Machine artist a performance royalty for its AM/FM performance of that song. For the first time in history a royalty will be paid for performance over the airwaves; and while this deal seems more expensive on the onslaught for Clear Channel, it is clear they believe digital radio is the future. By obtaining a lower royalty rate on their digital radio and breaking out of the pay-per-play model, Clear Channel took a gamble on digital radio.

#### IV. CONCLUSION

With all of the success of these online communities we forget that it is still a growing field. Digital music had a rough start in the 1990's when it was all essentially pirated on peer-to-peer networks such as Napster; such piracy cost the music industry millions of dollars a day.

Now, while the industry is growing in legitimate purposes and ways, there are many interests that have yet to be addressed. The biggest and perhaps the one that causes the most controversy is the artists' interest and their proper compensation. As a recent study by Peter DiCola of Northwestern University Law School shows, an artist stands to

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<sup>101</sup> Sydell, Laura. "Clear Channel Will Be The First To Pay Royalties For Music On Its Air." Jun 13, 2012. Available at: <http://www.npr.org/blogs/therecord/2012/06/13/154871444/clear-channel-will-be-the-first-to-pay-royalties-for-music-on-its-air>



make only 6% of their profits from sound recording royalties.<sup>102</sup> Moreover, an astonishing 78% of artists' income comes from sources that have no connection, either directly or indirectly, with copyright royalties. This is a much deeper problem that isn't addressed in this paper, which is namely the manner in which recording contracts are created and executed in favor of the record companies. However, there is still much to say about why their performances do not yield artist more income. As a result more and more artist is speaking out about streaming royalties.<sup>103</sup> Artist like Metallica, Pink Floyd, The Black Keys and Will.I.Am, have all spoken out against Spotify for paying 15% streaming royalty per play.

As David Byrne put it:

For a band of four people that makes a 15% royalty from Spotify streams, it would take 236,549,020 streams for each person to earn a minimum wage of \$15,080 (£9,435) a year. For perspective, Daft Punk's song of the summer, 'Get Lucky,' reached 104,760,000 Spotify streams by the end of August: the two Daft Punk guys stand to make somewhere around \$13,000 each. Not bad, but remember this is just one song from a lengthy recording that took a lot of time and money to develop. That won't pay their bills if it's their principal source of income. And what happens to the bands who don't have massive international summer hits?"<sup>104</sup>

As a result of this unfortunate truth many artist, especially smaller artist were forced to pull there music from services like Spotify and Pandora. In the same vein David Lowery has stated his disdain for the companies and have fought against "Pandora for trying to lower royalty rates, accused Google of masterminding a broad anti-copyright

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<sup>102</sup> Resnikoff, Paul. "A Tiny Percentage of Artists' Income Comes from Copyright, Study Finds..." Dec 2, 2013. Available at:

<http://www.digitalmusicnews.com/permalink/2013/12/02/artistsderivecopyright>

<sup>103</sup> Resnikoff, Paul. "16 Artists That Are Now Speaking Out Against Streaming." Dec 2, 2013. Available at: <http://www.digitalmusicnews.com/permalink/2013/12/02/artistspiracy>

<sup>104</sup> Id.

campaign.”<sup>105</sup> These artists, however, blame the business models of these platforms, namely the pay-per-play method of accounting royalties; however, they neglect to essentially the true root of the problem: the current copyright scheme.

Who then are benefiting from digital music royalties if not the artist? Perhaps we should turn to the interest of the record labels in order to understand the underpinning of the payment model, they are after all, the entity who pays the artist for their work. The unique problem with sound recording partial performance rights has created complexities in the system. It is also important to note that artist interest are not the same as record label’s interest; there are deep rooted problems with how artist are paid and how record labels seek to keep the artist in debt. While record companies are seeing billions of dollars in revenues, while artists are seeing \$15,000 for millions of plays on these online music communities. It is possible to create a copyright royalty system that fairly compensates artists, allows for a growing recoding industry and allows Internet radios and webcasters the ability to bring us into the future?

The answer to fair compensation to artist is outside of the scope of this paper. However, to extend and provide more avenues for compensation is much more feasible within the ideas of extending public performance rights in should recordings. The rights of the artist as rights holders, as well as fair compensation should be a real priority when deciding on the future. Thus, there should be a performance right in sound recording across all mediums. The antiquated notion that royalties on radio would kill radio is preposterous. Radio is not an infant industry that requires protection by the federal government. Rather it is an industry that was able to flourish and grow. Many radio

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<sup>105</sup> Id.

stations have or should have solid business models. However, if they don't, that should not be a deterrent to prevent fairness.

With all the current events and ill fitted congressional acts, there also needs to be a complete overhaul of the Copyright Act of 1976. During the years before the overhaul of the 1909 Act similar unwarranted behaviors from new industries created many problems, questions and concerns. During those same year Congress passed band-aid solutions that did not work for the problems in these new industries. The future is now; we are 10-12 years into a new industry that is filled with promise and change. The reality is that Congress needs to update the current legal scheme in order to better address the needs of this century.